

August 5, 2025

Mr. David Fish, Executive Director
Legal and Regulatory Services
Department of Labor and Workforce Development
P.O. Box 110, 13th Floor
Trenton, New Jersey 08625-0110

Via email to: david.fish@dol.nj.gov

Re: *Proposed New Rules Regarding Independent Contractors* - **SUPPORT**

Dear Mr. Fish and Members of the Department of Labor and Workforce Development:

The National Employment Law Project (“NELP”) submits this comment in support of the proposed regulation by the New Jersey Department of Workforce Development Department (“Department”) codifying its interpretation of the state’s long-standing statutory “ABC test.” 57 N.J.R. 894(a), Vol. 9 (May 5, 2025) (interpreting N.J.S.A. § 43:21-19(i)(6)(A) - (C)).

NELP is a nonprofit research and policy organization with more than 55 years of experience advocating for the employment and labor rights of low-wage workers. The organization is dedicated to building a good-jobs economy—one rooted in worker power, racial and economic justice, and the fundamental belief that every job should be a good job. As an essential aspect of its work, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in labor and employment laws. NELP has litigated on behalf of subcontracted workers called “independent contractors,” submitted amicus briefs in numerous independent contractor cases, testified in Congress regarding the importance and scope of employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. We appreciate the opportunity to comment on the proposed regulation.

We write to make 3 points:

1. Misclassification is a serious problem nationally and in New Jersey, stripping underpaid workers of essential protections, degrading working conditions, undermining law-abiding businesses, and depleting state revenue;
2. New Jersey’s well-established “ABC test” law provides a strong bulwark against independent contractor misclassification, similar to dozens of other states; and
3. The proposed regulation (or “rule”) helps clarify the analysis, thereby ensuring better compliance and limiting harmful misclassification.

1. Misclassification is a serious problem, stripping workers of essential protections, degrading working conditions, undermining law-abiding businesses, and depleting state revenue.

Employers that misclassify their employees as independent contractors strip them of bedrock employment rights, including but not limited to the right to minimum wage and overtime, the right to a healthy and safe workplace, and the right to unionize to improve working conditions. Misclassifying businesses also shirk their responsibilities to pay into social insurance funds, exclude workers from critical state social insurance programs like unemployment insurance and workers' compensation, and they transfer the employer payments of payroll taxes that fund Social Security and Medicare to their workers.

A. Misclassification Particularly Harms Already Underpaid Workers, Nationally and in New Jersey.

Misclassification costs New Jersey workers dearly, particularly those in several low-paid occupations. As the Economic Policy Institute (EPI) has shown, within occupations, workers classified as independent contractors suffer compensation penalties of more than 20 percent relative to their employee counterparts because they do not get paid overtime, paid leave, workers' compensation, and they lose employer contributions to health insurance and retirement plans.¹ To give just two examples from the EPI analysis:

- A New Jersey home health or personal care aide loses as much as \$12,022 per year, or nearly 31 percent of an annual employee salary; and
- A New Jersey janitor loses as much as \$10,721 per year, or nearly 30 percent of an annual employee salary.²

And the list goes on in heavily misclassified and low paying occupations such as manicurist, maid and residential house cleaner, delivery driver, truck driver, and construction laborer.

Other research confirms that without foundational protections, the earnings of many low-paid independent contractors lag behind the earnings of employees in those same occupations. Indeed, some of these so-called "independent contractors" even make less than the minimum wage for the localities in which they live. For example:

- A study of tax filings of employees and independent contractors in Washington, D.C. from 2010 to 2018 found that a majority of independent contractors (about 60 percent) earn under \$22,000 per year.

¹ EPI analyzed 11 commonly misclassified jobs and found that workers classified as independent contractors in these jobs, which include landscapers, truck drivers, home health aides, janitors, and nail salon workers, lose out on thousands of dollars per year in income and job benefits relative to what they would earn as an employee. Adewale Maye, Daniel Perez, and Margaret Poydock, *Misclassifying workers as independent contractors is costly for workers and states*, ECON. POL'Y INST. (Jan 22, 2025), <https://www.epi.org/publication/misclassifying-workers-2025-update/>.

² *Id.* at Fig. A, New Jersey.

Some of the most common occupations for independent contractors in this income range are janitors, drivers, and hairstylists.³

- A study by the University of California-Berkeley found that California construction workers misclassified as independent contractors suffered a 33 percent wage penalty relative to their employee counterparts.⁴
- A national study of digital labor platform workers (such as ridehail, restaurant and grocery delivery workers) found that one in seven earned less than the federal hourly minimum wage, and 30 percent of digital platform workers received a Supplemental Nutrition Assistance Program benefit, compared to 15 percent of employees in comparable service-sector jobs.⁵

Since up to 95 percent of workers who claim to be misclassified are found to be employees after investigation, millions of workers nationally, with untold thousands in New Jersey among them, likely suffer poverty wages and degraded working conditions related to their misclassification as independent contractors.⁶

B. *Misclassification of Underpaid Workers is Strikingly Racialized.*

For low-paid “independent contractors,” poverty-level pay is exacerbated by exclusion from social insurance programs like unemployment insurance and employment-related benefits like paid leave, health insurance, and workers’ compensation. Such workers live paycheck to paycheck, one accident or illness away from financial disaster, and without the means to even take a break from work much less retire or generate wealth.

The problem is strikingly racialized. Misclassification is a persistent problem in many low-paid occupations where the work is dangerous, isolated, and/or labor intensive, such as home care, janitorial work, trucking, construction, personal services, hospitality, and in most app-dispatched jobs like ridehail and delivery. Black, immigrant, and other workers of color—who encounter discrimination and a long history of occupational segregation that too often limits their job opportunities—are overrepresented in these highly precarious occupations. As a group, workers of color are overrepresented in construction, trucking, delivery, home care, agricultural, personal care, ridehail, and janitorial and building service occupations by over 40 percent; they comprise just over a third of workers overall, but between 47 and 91 percent of

³ Corey Husak, *The Self-Employment Income Drop*, OFFICE OF REVENUE ANALYSIS OF WASHINGTON, D.C. (Dec. 2022), <https://ora-cfo.dc.gov/blog/self-employment-income-drop>.

⁴ Ken Jacobs and Kuochih Huang, *The Public Cost of Low-Wage Jobs in California’s Construction Industry*, UNIVERSITY OF CALIFORNIA-BERKELEY LABOR CTR. (Jun. 2021), <https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/>.

⁵ Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL’Y INST. (Jun. 2022), <https://www.epi.org/publication/gig-worker-survey/>.

⁶ *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. L. PROJECT 3 (Oct. 2020) <https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>, (citing Lalith DaSilva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLANMATICS, INC., PREPARED FOR U.S. DEP’T OF LAB. EMP. AND TRAINING ADMIN. (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.) (hereinafter *Huge Costs*, NELP).

workers in these occupations.⁷ Because misclassification causes significant wage and benefit penalties, it helps enable racialized income and wealth inequities in the United States.

C. *Misclassification Hurts New Jersey Businesses and State Revenue.*

Misclassification of employees as independent contractors also causes negative ripple effects in the community. Cheating businesses make it more difficult for law-abiding businesses to compete, especially in the labor-intensive and bid-based jobs: construction, janitorial, home care, delivery, and others. The practice, as the United States Treasury Inspector General found, “plac[es] honest employers and businesses at a competitive disadvantage.”⁸ Businesses that misclassify their employees pocket between 20 to 40 percent of payroll costs they would otherwise incur for unemployment insurance, workers’ compensation premiums, the employer share of Social Security, and health insurance premiums.⁹ They pressure their competition to shed labor costs, creating a race to the bottom where firms try to remain competitive by following suit. A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually.¹⁰

Misclassifying employers also cost federal and state governments billions of dollars per year in unreported payroll taxes and unemployment insurance contributions.¹¹ Recent national estimates are difficult to come by, but a 2009 report by the Government Accountability Office estimated that independent contractor misclassification cost federal revenues \$2.72 billion in 2006 dollars, amounting to more than five billion dollars today.¹²

New Jersey’s revenues clearly suffer as well. In 2018, New Jersey’s audits of employer accounts found more than \$462 million in underreported wages, and nearly \$14 million in underreported contributions to

⁷ NELP analysis of March 2024 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see CPS Annual Social and Economic Supplement, U.S. Census Bureau, <https://data.census.gov/app/mdat/CPSASEC2024/vars>.

⁸ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1 (2018-IC-R002: Feb. 20, 2018), <https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf>.

⁹ Fran oise Carr , *(In)Dependent Contractor*, ECON. POL’Y INST. 5 (Jun. 8, 2015), <https://files.epi.org/pdf/87595.pdf>.

¹⁰ See Douglas McCarron, *Worker Misclassification in the Construction Industry*, 57 BNA Construction Labor Report 114 (April 7, 2011). See also Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation Premiums*, DEP’T OF ECON., UNIV. OF MO., KAN. CITY 5-6 (Sept. 12, 2010).

¹¹ *Huge Costs*, NELP, *supra* n. 6 at 2-3.

¹² See U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (Aug. 2009), <http://www.gao.gov/new.items/d09717.pdf> (noting \$1.6 billion lost in 1984 dollars). See also U.S. Bur. Lab. Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm. Of note, the analysis used by the Internal Revenue Service is a more malleable multi-factor analysis compared to the ABC test.

unemployment, disability, family leave insurance and workforce assessment funds. Such numbers are likely an undercount because audits are required of just 1 percent of registered employers annually.¹³

EPI's analysis further confirms the significant costs to New Jersey. For example, for *each* construction laborer classified as an independent contractor, New Jersey loses a median amount of \$3,284 in social insurance funds contributions each year.¹⁴ The state also loses roughly \$1,500 for *each* home health care or personal aide, maid or housekeeper, and each security guard classified as an independent contractor annually.¹⁵ Combined, these costs are staggering. More than 220,000 New Jersey residents work as construction laborers, maids/housekeepers, and security guards.¹⁶ Moreover, there are tens of thousands of New Jerseyans working as independent contractors in low-paid trucking, delivery, housekeeping, janitorial, personal care, homecare, construction and agricultural occupations.¹⁷

2. New Jersey's well-established "ABC test" law provides a strong bulwark against independent contractor misclassification, similar to other states that rely on it.

New Jersey's "ABC test" law has been in effect since 1936.¹⁸ The three-pronged analysis was developed as a way of determining coverage for unemployment insurance, with an intent to broaden coverage beyond traditional master-servant, or common law relationships.¹⁹ By 1942, some 42 states had adopted and applied the analysis in some form,²⁰ and it is used in more twenty states today.²¹ This means that agencies and businesses in those states know the law and understand what compliance looks like.

While the analysis is intentionally broad, it is not limitless: "the ABC test was created to identify a category of worker which was broader than the employee category traditionally carved out by the common law

¹³ *Report of Gov. Murphy's Task Force on Employee Misclassification* 6 (2019), <https://www.nj.gov/labor/assets/PDFs/Misclassification%20Report%202019.pdf>. See also, *Huge Costs*, NELP, *supra* n. 6 at 9, n. 45.

¹⁴ EPI, *Misclassifying Workers*, *supra* n. 1 at Fig. B, New Jersey.

¹⁵ *Id.*

¹⁶ NELP analysis of 2023 American Community Survey data, available at <https://data.census.gov/app/mdat/ACSPUMS1Y2023/table?cv=COW&rv=ucgid,SOCP&wt=PWGTP&g=AwFm-BVBIBmEq>.

¹⁷ NELP analysis of 2023 American Community Survey data, available at <https://data.census.gov/app/mdat/ACSPUMS1Y2023/table?cv=COW&rv=ucgid,SOCP&wt=PWGTP&g=AwFm-BVBIBmEq>.

¹⁸ P.L. 1936, c. 270 sec. 19(i)(6).

¹⁹ Syed M. Q. Ali Khan, *The Hiring Entity's Usual Course of Business*, 18 *Hastings Bus. L.J.* 109, 121-122 (2021), https://repository.uchastings.edu/hastings_business_law_journal/vol18/iss1/6.

²⁰ *Id.* at 121.

²¹ See U.S. Dep't of Lab., Empl. And Training Admin., *Comparison of State Unemployment Laws* 1-4, 1-5 (2023) ("Employer-Employee Relationship" Coverage Table), <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2023/complete.pdf>.

control test while not encompassing the entirety of those that fall within the independent contractor category of workers.”²² Notably, adoption of the “ABC test” by dozens of states did not lead to the demise of all independent contractors, nor eviscerate the freedom of individuals to form their own businesses and contract at arm’s length to sell their goods or services. On the contrary, the analysis is now very well established, and many New Jersey businesses have been required to comply with it for decades.

Moreover, the New Jersey Supreme Court has protected against overly broad coverage, limiting interpretations of the statute that would be “practically impossible” to meet. *See, e.g., Carpet Remnant Warehouse, Inc. v. New Jersey Dep’t of Lab.*, 125 N.J. 567, 592-93 (1991) (holding that Prong B’s “place of business” refers only to those locations where “the enterprise has a physical plant or conducts an integral part of its business”). Recognizing the Court’s limitation, the rule amplifies that analysis in its examples.²³

The “ABC test” does not outlaw independent contracting, but it does effectively limit the misclassification of employees and better ensure they have the rights and protections to which they are entitled. It establishes a presumption of employee status, reflecting the undeniable reality that most individuals who perform work for pay are working *for* a business, their employer; they are not running their own businesses. This presumption is efficient yet not insurmountable: the hiring entity or business is well positioned to supply the information needed to show that they are engaging a legitimate independent contractor. Indeed, New Jersey businesses have met this burden. *See, e.g., Garden State Fireworks, Inc. v. New Jersey Dep’t of Lab. & Workforce Dev.*, No. A-1581-15T2, 2017 WL 4320819, at *1 (N.J. Super. Ct. App. Div. Sept. 29, 2017) (finding that pyrotechnicians hired to conduct fireworks displays for a fireworks business were not employees); *Trauma Nurses, Inc. v. Bd. of Rev., New Jersey Dep’t of Lab.*, 242 N.J. Super. 135 (App. Div. 1990) (finding that nurses were independent contractors not employees of nurse staffing company that supplied hospitals with temporary nurses).

In short, the “ABC test” has helped ensure that millions of workers both in New Jersey and elsewhere have access to bedrock employment and labor protections, that business compete on a level playing field, and that governments are not robbed of revenues that support social insurance programs. This rule will expand the understanding of the analysis in New Jersey, and claims that the sky is falling are simply without merit.

The Proposed Regulation is Consistent with State Supreme Court Precedent and Provides Helpful Clarity to Limit Harmful Misclassification of Employees.

Consistent with controlling case law and common sense, the rule presumes that a worker is an employee and would require a potential employer or hiring entity (“hiring entity”) to prove each of the three prongs (A, B, and C) in order to exempt a worker from employment protections. *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289, 305 (2015); *E. Bay Drywall, LLC v. Dep’t of Lab. & Workforce Dev.*, 251 N.J. 477, 495 (2022); *Carpet Remnant*, 125 N.J. at 581.

²² Ali Khan, *Usual Course*, *supra* n. 19 at 122.

²³ *See* 57 N.J.R. 894(a) (proposed 12:11-1.4(g) discussing Prong B and explaining that the showroom of a carpet sales business is a physical plant, and service of carpet installation as ancillary to, carpet sales business, therefore customer’s home would be outside the place of business).

D. *The Rule Clarifies Each Prong of the Three-Part Analysis.*

Relying heavily on and amplifying factors relied on by New Jersey courts, the rule provides meaningful clarity for each part of the ABC test. Importantly, the Department clarifies that listed factors are not to be confused with a checklist, and that additional relevant factors may be considered. As such, the determination of independent contractor status does not depend on a scoreboard for each factor. Rather, the question “is determined based on an evaluation of the facts surrounding the relationship between the [hiring entity and worker] and the application of the ABC test to those facts.” 57 N.J.R. 894(a) (proposed 12:11-1.6).

I. **Prong A**

The Department’s description and suggested factors elucidate the first element (Prong A) well, consistent with court interpretations and its expertise. The highlighted indicia of control are particularly clarifying. Considerations such as whether: the hiring entity “requires the individual to use a digital application or software in the course of performing the services that are primarily or unilaterally controlled” by the hiring entity; a worker must wear a uniform or “display a specific logo . . . or other insignia;” and the hiring entity determines the worker’s pay each suggest significant control. In today’s economy, corporations like Uber and Amazon purport to offer “flexibility” to workers that they insist are ‘independent contractors’ but then rely on hidden algorithms and electronic surveillance (“bossware”) to control virtually every aspect of the work, including: who can work and when; whether they will be disciplined through termination or suspension (“deactivation”); to which customers they will provide services while displaying the corporate logo; and how much (or little) they will be paid—and workers lack the ability to increase prices when business expenses rise.

Amazon’s take-it-or-leave-it adhesion contracts detail requirements its Flex “delivery service partners” must adhere to at risk of losing work. In its Terms of Service agreements with Flex delivery app drivers, Amazon reserves the right to control drivers’ vehicles and services during scheduled work hours, to set driver pay, and to terminate drivers.²⁴ The Amazon-designed Flex app is perpetually tracking and evaluating Flex driver location and performance data to determine their access to work and pay.²⁵ Indicia of control, whether exercised, hidden, or reserved must be analyzed.

This first element of the proposed rule would also appropriately consider control for the purpose of legal compliance as a factor. Control is relevant regardless of the reason for it, and control for legal compliance indicates power: if a government agency or other entity charges a hiring entity with ensuring legal or regulatory compliance, that hiring entity has, or should have, the requisite control and power to ensure such compliance. Thus, it is a factor that should be considered along with other indicia of actual or reserved control.²⁶

²⁴ See Maya Pinto, *Delivering Precarity: How Amazon Flex’s Labor Model Harms Workers and What to do About It*, NAT’L EMPL. L. PROJECT 8 (July 2025), <https://www.nelp.org/insights-research/delivering-precarity-how-amazon-flex-harms-workers-and-what-to-do-about-it/>.

²⁵ *Id.* at 16.

²⁶ As a federal circuit court has recognized in a similar context, the inquiry looks to “the nature and degree of the alleged employer’s control, not why the alleged employer exercised such control.” *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013).

II. Prong B

The second element (Prong B) of the rule is consistent with the statute, enabling a hiring entity to satisfy this element by showing either of two things: the worker's service is outside the usual course of the hiring entity's business; or the worker's services are performed outside of all the places of business of the enterprise.

The rule explains that the "usual course of business" includes the tasks or activities a hiring entity regularly undertakes in order to provide its goods or services, or to generate revenue. 57 N.J.R. 894(a) (proposed 12:11-1.4). This element looks to the goods or services the hiring entity is known for, —i.e., what it markets to its customers or client community. The commonsense examples provided in the proposed rule make this point: a drywall company provides drywall installation, so the drywall workers perform work in the company's usual course of business. In contrast, a restaurant's usual course of business is serving food, such that if it hires a musician to perform on a given night, the music provided by the musician is likely outside of the restaurant's usual course of business.

Additionally, the rule also clarifies what constitutes a "place of business," which includes where the hiring entity conducts "an integral part of its business." As the Department explains, this includes only work that is an "essential component of, rather than ancillary to, the putative employer's business." *Id.* Again, the rule provides helpful examples and counter examples: the airplane of an airline business is place of business, but public buildings or libraries used by title abstractors are not.

Further, the recognition that customer homes *may* be "places of business" does not render the rule overbroad. The Department's suggestion that a worker who *installs* a carpet from a carpet *sales* company would not be working within the carpet sales company's business is drawn from and consistent with New Jersey's Supreme Court analysis. See *Carpet Remnant*, 125 N.J. 567. Likewise, the rule will not transform every remote worker's residence into a place of business, as the rule specifically suggests otherwise.

III. Prong C

The final element requires that the hiring entity show that it has engaged "an enterprise that exists and can continue to exist independent of, and apart from, the particular service relationship with the putative employer; that is, the enterprise must be stable and lasting and able to survive the termination of the relationship" with the hiring entity. 57 N.J.R. 894(a) (proposed 12:11-1.5).

This third element examines whether the worker has a genuine standalone business. Analyzing the viability of the worker's business *independent of* the hiring entity, including its customer base and volume, investments, and whether it sets prices, passes along costs of doing business or sets pay rates helps ensure that the analysis looks past form and into substance. The rule also helpfully establishes a number of guardrails, explaining that certain facts, standing alone, do not indicate an independent business including: working for multiple employers; having a professional license; having a sole proprietorship or LLC.; or having liability insurance.

Indeed, the Department's rule reflects an understanding of the power dynamics between hiring entities and individual workers. It appreciates that hiring entities often have power to manipulate certain factors by requiring them as a condition of work, and that workers may agree to contractual demands simply to

ensure some income to put food on the table or pay the rent. For instance, the rule recognizes that where a hiring entity suggests or encourages workers to obtain insurance, such insurance does not suggest the worker is an independent contractor. It also recognizes that a hiring entity cannot transform an employee into an independent contractor by choosing to report earnings using a Federal IRS Form 1099 instead of Federal Form w-2. Moreover, the rule requires any independent contractor “agreement” to be examined considering who drafted it, whether it was negotiated, whether the hiring entity can unilaterally modify it, and whether either party can terminate their relationship at any time during the term of the agreement.

The rule's approach to the third element (Prong C), as with the other elements, provides needed clarity and useful examples that will promote understanding and help ensure statutory compliance.

* * *

In sum, NELP fully **supports** the proposed rule as consistent with the statute and New Jersey Supreme Court interpretations, and as helpful in educating stakeholders and helping end independent contractor misclassification in today's economy. Thank you.

Sincerely,

/s/
Sally Dworak-Fisher
Senior Staff Attorney